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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. [04-cv-02233-PJH](#)

SALVADOR A. RODRIGUEZ,
Petitioner,
v.
DERRAL ADAMS, Warden,
Respondent.

**ORDER DENYING MOTION TO
EXCUSE PROCEDURAL DEFAULT
AND ISSUING CERTIFICATE OF
APPEALABILITY**

Before the court is the motion of petitioner Salvador A. Rodriguez to excuse procedural default pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Respondent Derral Adams has filed an opposition, and Rodriguez did not file a reply. The matter is suitable for decision without oral argument and submitted on the briefs. Having carefully considered the relevant authority, the papers, and the evidence in the record, the court DENIES the *Martinez* motion.

BACKGROUND

The following summary of relevant facts and procedural history is taken primarily from the June 1, 2011 order granting habeas relief, the August 23, 2011 order granting in part respondent's motion to alter judgment and setting an evidentiary hearing, and the February 24, 2012 order denying habeas relief following evidentiary hearing. Given the lengthy history of the proceedings, the court finds it useful to restate the factual and procedural background here.

1 **A. Factual Summary**

2 On the evening of March 3, 1998, in Oakland, California, Rodriguez shot and killed
3 Frederick Walker ("Walker"). Prior to the shooting, a group of neighborhood youths
4 including Roy Ramsey, Vonree Alberty, Kenneth Jackson, Thurston Breshell, Marcus
5 Hawkins, and Albert Bagwell (referred to collectively as the "Melrose group") were
6 hanging out in and around a car (the "Jackson-Alberty car") on the 4700 block of Melrose
7 Avenue, also the block on which Rodriguez lived, near Hawkins' house. Shortly before
8 6:00 p.m., a station wagon with approximately nine or ten African-American teenagers¹
9 (the "Walker group" or "Walker car") drove down Melrose Avenue, from 47th to 48th
10 Avenues and made a u-turn on 48th Avenue. The teenagers in the Walker group were
11 not from the neighborhood. Among others, the Walker group included the driver, Damon
12 Brown; Brown's cousin, Ferrari Johnson; the victim, Frederick Walker; and the victim's
13 brother, David Walker.

14 The Walker station wagon first parked near a stop sign on 48th Avenue. The
15 occupants of the Walker car then exited the vehicle and approached the Melrose group.
16 After the Walker group converged on the Melrose group, the groups then split. Ramsey,
17 a member of the Melrose group, walked down the street and was subsequently
18 surrounded by members of the Walker group. Breshell, Alberty, and Jackson, other
19 members of the Melrose group, remained in or around the Jackson-Alberty car and were
20 also approached by members of the Walker group.

21 The timing of the subsequent events is a bit unclear. Members of the Walker
22 group "relieved" Ramsey of three dime bags of marijuana.² Around the same time, a
23 member of the Walker group went back to their station wagon, and pulled it alongside,

25
26 ¹ Witnesses gave varying numbers, and it was never established exactly how many
27 people comprised the Walker group.

28 ² Ramsey testified at a preliminary hearing that he was robbed, but the prosecution
argued at trial that there was no admissible evidence that a robbery occurred, based
largely on the fact that the defense did not call Ramsey to testify at trial.

1 apparently double-parking next to the Jackson-Alberty car. Two members of the Walker
2 group then began hassling Breshell.

3 After the Walker group took the marijuana from Ramsey, Ramsey walked across
4 the street to Rodriguez's house, and went up to Rodriguez, who had exited his house
5 after hearing loud noises. Ramsey told Rodriguez that he had just been robbed by the
6 Walker group. At this point, Rodriguez observed a tussle between Breshell and members
7 of the Walker group. Ramsey subsequently gave Rodriguez a gun, and Rodriguez then
8 shot up in the air several times in an attempt to scare away the Walker group. One of
9 these shots hit the victim, Walker, in the head and killed him.

10 On July 8, 1998, Rodriguez was charged with murder under California Penal Code
11 § 187, along with enhancements that during the commission of the murder, he
12 intentionally discharged a firearm and proximately caused death under California Penal
13 Code § 12022.53(d); that he used a firearm under California Penal Code §§ 1203.06 and
14 12022.5; and that he inflicted great bodily injury under California Penal Code § 1203.075.

15 **B. Trial Proceedings**

16 **1. Prosecution Key Witnesses**

17 **a. Jewel Marshall**

18 The prosecution called Jewel Marshall, a neighbor of Rodriguez who lived on
19 Melrose Avenue. Marshall testified that he was at home on the evening of the shooting,
20 and that after hearing loud voices outside, he looked out of his front window to see what
21 was going on. Marshall testified that he observed at least two African-American
22 teenagers standing near a station wagon parked in front of his driveway in the street, and
23 that he saw another group of teenagers standing by the stairs to his neighbor Marcus
24 Hawkins' house, including Hawkins, Bagwell, and Ramsey.

25 When Marshall first looked out the window, he testified that there did not seem to
26 be a fight or an altercation between the two groups of people, and he did not see any
27 weapons, so he left his window and went about his business. However, he subsequently
28 heard gunshots and then went back to his window. While he was away from the window,

1 Marshall could still hear that there was a conversation outside, but reported that the tone
2 subsequently increased in urgency.

3 When he went back to the window after hearing the shots, he saw the teenagers
4 that had been surrounding the Walker station wagon run away at the sound of the
5 gunfire. Marshall testified that he observed Rodriguez shooting the gun. Marshall also
6 observed one of the fleeing teenagers fall to the ground in the street. After the shooting,
7 Marshall witnessed a fist fight break out among the Walker group and the Melrose group.

8 **b. Armando Salazar**

9 The prosecution also called Armando Salazar, another Melrose Avenue resident,
10 and a neighbor of Rodriguez's. Salazar arrived home at 5:45 p.m. on March 3, 1998.
11 While he was still in his vehicle in front of his house, he noticed the Walker group's
12 station wagon parked in front of his neighbor and prosecution witness, Marshall's house,
13 and he subsequently saw nine or ten African-American teenagers jump out of the station
14 wagon. At that point, Salazar entered his home because he had never seen the
15 teenagers before, and told his wife to collect their kids from the backyard because the
16 strange teenagers in the street made him nervous. However, Salazar testified that the
17 teenagers were not fighting at that time.

18 When the Walker teenagers exited the station wagon, Salazar saw that one of
19 them had a beer and another one urinated on a lawn. He testified that the teenagers
20 were loud, but that he did not see any weapons on the Walker group, and that he did not
21 observe the group fighting before the shots were fired. Salazar did not observe an
22 altercation until he heard a gunshot three or four minutes later. At that point, he looked
23 out of his kitchen window and observed Rodriguez holding a gun. When Rodriguez
24 finished shooting, he turned and walked back into his house.

25 Salazar testified that he saw the teenagers run away when the shooting started.
26 Subsequently, the members of the two teenage groups started fighting.

27
28

1 **c. Officer Morse**

2 Officer Morse participated in pulling over the Walker station wagon containing
3 Walker group members Ferrari Johnson and Damion Brown after the shooting. He
4 testified that the officers did not find a weapon in the Walker car.

5 **2. Defense Witnesses**

6 Rodriguez's defense was that he fired the gun to protect his friends from members
7 of the Walker group, who were robbing them. Only Rodriguez and Breshell testified for
8 the defense.

9 **a. Thurston Breshell**

10 Breshell testified that he was present on the 4700 block of Melrose Avenue at the
11 time of the March 3, 1998 shooting. He attested that he and Ramsey were standing
12 outside of a car occupied by Alberty and Jackson when they saw the Walker station
13 wagon drive by.

14 Breshell testified that the car drove by slowly, and that he observed someone who
15 appeared to be laying down suspiciously in the back seat of the car. Breshell then saw
16 the Walker car make a u-turn on 48th Avenue and park near the stop sign at the corner.
17 At that point, Breshell testified that five people got out of the station wagon, broke a wine
18 bottle, talked to Hawkins, and approached the Melrose group. According to Breshell,
19 their group then split: one group remained at the Jackson-Alberty car and the other group
20 moved in front of Marshall's house.

21 Then, a member of the Walker group went back to their station wagon and pulled it
22 "halfway on the side of the" Jackson-Alberty car. Breshell described the atmosphere as
23 "hostile" when the Walker car pulled alongside the Jackson-Alberty car. After pulling to
24 an abrupt stop, the driver of the Walker car exited the car and talked loudly to Breshell.
25 At this point, Breshell saw Ramsey walking towards Rodriguez's house. Breshell did not
26 see Ramsey get robbed.

27 The Walker group then grabbed Breshell and tried to get into his pockets. As
28 Breshell was trying to fight off two members of the Walker group, Alberty and Jackson

1 drove away in their car. Breshell testified that he saw a third member of the Walker
2 group, who might have been the victim, approach him, and also saw this person reach in
3 his jacket for a gun. Breshell testified that he saw the handle of a gun tucked into the
4 waistband of this person's pants. Breshell punched this approaching member of the
5 Walker group before he could get the gun out of his pants.³

6 Breshell then heard a gunshot and ran away. He ran towards Rodriguez's house.
7 The members of the Walker group who had been attacking Breshell then drove away in
8 their station wagon. Breshell testified that he thought Rodriguez was protecting him
9 (Breshell) when he fired the shots, including the one that hit Walker.

10 Breshell testified that he then went inside Rodriguez's house and was there when
11 the police arrived. Breshell stated that he never talked to the police even though he had
12 been personally involved in the altercation. He explained that the police make him
13 nervous.

14 **b. Rodriguez**

15 Rodriguez testified that he was in his bedroom between 5:00 and 6:00 p.m. on
16 March 3, 1998, when he heard loud noises from outside the house. He left his bedroom
17 and his house, and walked down toward the street on Melrose Avenue to investigate.

18 When he got to the street, he saw "a lot of commotion." Rodriguez observed some
19 people whom he recognized, including Breshell, Ramsey, Jackson, Hawkins, and
20 Bagwell, and five other people that he did not recognize. He did not see any fighting
21 when he first observed the large group of people.

22 Rodriguez testified that Ramsey crossed the street and approached him, as
23 Rodriguez kept an eye on the altercation between the Melrose group and the Walker
24 group. Rodriguez testified that Ramsey then told him that he had just been robbed.⁴

25 _____
26 ³ The court notes that at trial, the prosecution emphatically argued that the Walker group
27 had no guns or weapons.

28 ⁴ Because it was hearsay, the trial court admitted Rodriguez's testimony regarding what
Ramsey told him not for the truth but to explain Rodriguez's state of mind, and the jury

1 Rodriguez then observed the Walker group start to “go[] through [Breshell’s]
2 pockets,” and saw Breshell struggling with the Walker group. Ramsey shouted to the
3 Walker group to leave Breshell alone because Ramsey was the one with marijuana.

4 Rodriguez knew that Ramsey had a gun and asked Ramsey why he had not used
5 it against the Walker group as they were robbing him. Rodriguez then told Ramsey to
6 shoot the gun in the air to scare off the Walker group, but Ramsey instead pushed the
7 gun into Rodriguez’s hands. Rodriguez saw the Walker group crossing the street toward
8 him, and he twice fired the gun into the air. Two teenagers retreated, but two continued
9 to hassle Breshell. Rodriguez told the remaining two to “get off” Breshell, and when they
10 did not, Rodriguez fired the gun three more times at approximately a twenty-degree
11 angle.

12 Rodriguez conceded that he never observed a gun on any member of the Walker
13 group, but nevertheless testified that he shot the gun to protect Breshell. He thought that
14 the altercation between the Walker group and the Melrose group was “more than a fist
15 fight.”

16 **3. Prosecution Rebuttal**

17 In rebuttal, the prosecution called two officers to testify in order to call into question
18 Breshell’s credibility. Officer Bardsley, the officer who canvassed the neighborhood after
19 the shooting to get statements from potential witnesses, testified that he entered
20 Rodriguez’s home to interview people at the residence and he did not observe any
21 African-American males at that house. In other words, Bardsley did not see Breshell,
22 who had earlier testified that he was present when the police came to Rodriguez’s house.

23 **4. Closing Arguments**

24 During closing arguments, the prosecution conceded that the case “made no
25 sense,” and argued that the victim was dead because of “a senseless act.” Although it
26 did not offer a motive for the shooting, the prosecution emphasized that the shooting was

27
28 was given a limiting instruction to that effect.

1 not justified or excusable, nor did it constitute a crime committed in the heat of passion or
2 a case of imperfect self-defense.

3 The defense, on the other hand, argued that the use of deadly force was justified
4 because Rodriguez was defending Breshell, who was being robbed. In her closing
5 argument, counsel argued that Rodriguez had just been told by Ramsey that Ramsey
6 had been robbed right before he approached Rodriguez, immediately prior to Rodriguez
7 personally observing his friend, Breshell, in an altercation with two members of the
8 Walker group, who appeared to be robbing Breshell.

9 **5. Verdict and Post-Conviction Proceedings**

10 On January 20, 2000, an Alameda County Superior Court jury convicted
11 Rodriguez of second degree murder with the use of a firearm to proximately cause death,
12 but found the allegation of infliction of great bodily injury to be untrue. The trial court
13 sentenced Rodriguez to state prison for a term of 40 years to life.

14 Rodriguez unsuccessfully appealed his conviction to the California Court of
15 Appeal, and the California Supreme Court denied review on February 13, 2002.

16 Rodriguez subsequently filed a pro se state habeas petition with the Alameda
17 County Superior Court, which the court denied. He then filed a habeas petition with the
18 California Court of Appeal, and that court issued a postcard denial. On February 4, 2004,
19 the California Supreme Court summarily denied Rodriguez's pro se petition for state
20 habeas relief.

21 **C. Federal Habeas Proceedings**

22 On June 7, 2004, Rodriguez filed his original pro se habeas corpus petition under
23 28 U.S.C. § 2254. The handwritten petition appeared to include two grounds for relief:
24 (1) a claim based on trial counsel's failure to investigate, and (2) a claim that the state
25 trial court erred in giving a jury instruction. In addition to his handwritten petition,
26 Rodriguez attached eight exhibits, A-H, which he had previously submitted to the
27 California Supreme Court with his state habeas petition.

1 On July 6, 2004, this court issued an order dismissing the petition with leave to
2 amend, noting that it could not determine the nature of the claims from the petition.
3 Subsequently, on August 11, 2004, the court received a letter from William Foskett
4 ("Foskett"), an investigator who had previously been assigned to Rodriguez's case by the
5 Alameda County Public Defender's office. As background, Foskett noted that he had
6 worked as an officer for the Oakland Police Department for twenty years, subsequently
7 worked as an investigator for the Alameda County Public Defender's Office, and later
8 earned a law degree. Foskett's letter to the court detailed his concerns about the way
9 Rodriguez's case had been handled by his trial counsel, Pauline Weaver. Foskett asked
10 the court to pay special attention to Rodriguez's case, and requested that the court
11 appoint counsel for him.

12 On October 26, 2004, the court issued an order granting an extension of time for
13 Rodriguez to amend the original petition. The court noted that its prior order had been
14 returned as undeliverable, and the clerk sent another copy of the prior July 6, 2004 order
15 to the address previously supplied by Rodriguez. Additionally, the court asked that
16 another copy be sent to Foskett to ensure that Rodriguez would receive it.

17 On November 1, 2004, in response to the order, Foskett sent another letter to the
18 court providing an updated address for Rodriguez. Foskett also stated in the letter that
19 Rodriguez did not have the intellectual capacity to prosecute his habeas case and again
20 requested the court to appoint counsel for Rodriguez.

21 On November 24, 2004, Rodriguez, still pro se, filed an amended petition. In the
22 amended petition, Rodriguez asserted that he was entitled to relief based on claims that:

- 23 (1) his counsel was ineffective in failing to hire an investigator to investigate the
24 facts of his case, as detailed in a letter from Foskett;
- 25 (2) the trial court erred in giving incomplete instructions and in not giving him a
26 copy of one of the instructions; and
- 27 (3) his trial counsel had a conflict of interest because Rodriguez had discharged
28 her earlier in the case.

1 Rodriguez attached the same typewritten document that accompanied his original
2 petition. Additionally, he included another letter from Foskett detailing the weaknesses
3 that Foskett perceived in the defense's pretrial investigation of Rodriguez's case.

4 On December 12, 2004, the court issued an order to show cause requiring the
5 state to respond to issues one and three, but dismissed the second issue regarding the
6 jury instructions because it did not present a federal constitutional issue. On June 20,
7 2005, the state filed a motion to dismiss for failure to exhaust, in which it argued that one
8 of the two remaining claims - that regarding Rodriguez's trial counsel's alleged conflict of
9 interest - was unexhausted in state court. Therefore, the state argued that the case
10 should be dismissed until Rodriguez exhausted the conflict of interest claim in state court.

11 Rather than opposing the state's motion to dismiss, Rodriguez sent the court two
12 letters, one on August 25, 2005, and another on December 22, 2005, requesting a status
13 report for his case. Additionally, on January 3, 2006, Foskett wrote another letter to the
14 court on behalf of Rodriguez's mother requesting a status report.

15 Rodriguez ultimately failed to oppose the state's motion to dismiss, and on March
16 13, 2006, the court granted the state's motion to dismiss the conflict of interest claim as
17 unexhausted with leave to amend. In light of Rodriguez's pro se status, the court
18 carefully delineated Rodriguez's three options going forward, noting that he could: (1)
19 voluntarily dismiss the case and exhaust the unexhausted claim in state court; (2) amend
20 the petition to delete the unexhausted issue so that the court could proceed on the one
21 exhausted issue; or (3) ask the court for a stay of the federal proceedings to afford him
22 the opportunity to exhaust the second claim in state court.

23 On March 27, 2006, Rodriguez submitted a letter to the court requesting to amend
24 his petition to remove the unexhausted claim regarding his trial counsel's alleged conflict
25 of interest. In a March 30, 2006 order, the court treated Rodriguez's letter as an
26 adequate amendment, deemed the petition amended, and directed the state to file an
27 answer to Rodriguez's petition within sixty days. Accordingly, only the ineffective
28 assistance of counsel claim remained.

1 After the state filed its answer and the state court record on May 2, 2006,
2 Rodriguez filed a two-page handwritten response on June 8, 2006, that purported to be
3 his traverse. In support, Rodriguez appended another letter from Foskett. Foskett had
4 apparently reviewed the state's answer and drafted a letter to Rodriguez analyzing the
5 state's arguments and advising him how to proceed. Rodriguez's traverse paraphrased
6 Foskett's letter.

7 On May 28, 2006, Rodriguez filed a motion requesting the court to appoint him
8 counsel. Rodriguez stated that he did not have the requisite legal knowledge to
9 adequately proceed with his habeas petition. Subsequently, on January 26, 2007, the
10 court received another letter from Foskett. This letter, similar to many of the previous
11 letters, explained Foskett's role in the original investigation of the case and Foskett's
12 opinions about the quality of the defense. Additionally, Foskett reiterated his belief that
13 the court should appoint Rodriguez counsel.

14 On March 1, 2007, the court granted Rodriguez's request for appointment of
15 counsel and stayed the habeas proceedings pending such appointment. On April 26,
16 2007, after counsel was appointed for Rodriguez, the court issued an order for
17 supplemental briefing by Rodriguez, allowing newly appointed counsel to supplement the
18 traverse that Rodriguez had previously filed pro se because the original traverse was
19 inadequate.

20 On September 17, 2007, with the assistance of his appointed counsel, Rodriguez
21 filed a supplemental traverse and a request for an evidentiary hearing. Rodriguez
22 elaborated on his ineffective assistance of counsel claim, asserting that his trial counsel
23 was ineffective for (1) failing to present testimony from witnesses who were located and
24 interviewed by Investigator Foskett prior to trial, who he claimed would have supported
25 his defense that the homicide was justified, including Roy Ramsey, Elaine Caufield, and
26 Dennis Lyons; and (2) for failing to locate and investigate additional witnesses who were
27 available and who would have testified that Rodriguez's role in the homicide was justified,
28 including Kenneth Jackson and Vonree Albery.

1 Rodriguez argued that the additional witnesses would have substantiated the
2 defense's position that the victim and/or the victim's friends were committing a robbery or
3 robberies at the time the victim was shot. Accordingly, Rodriguez contended that the
4 additional witnesses would have supported his defense at trial that the homicide was
5 justified in that he acted reasonably in the defense of another, or alternatively, that the
6 evidence would have supported a conviction on the lesser-included offense of voluntary
7 manslaughter by suggesting to the jury that Rodriguez acted honestly but unreasonably
8 in the defense of another or in the heat of passion.

9 In support, Rodriguez attached six exhibits to his supplemental traverse, which
10 were not previously a part of this court's record, nor were they a part of the record before
11 the California Supreme Court. Those exhibits included: (1) a September 9, 2007
12 declaration from Scott Whitney; (2) a September 10, 2007 declaration from Vonree
13 Albery; (3) a September 16, 2007 declaration from Kenneth Jackson; (4) a May 3, 1999
14 interview report of Dennis Lyons; (5) a September 16, 2007 declaration from Foskett; and
15 (6) a May 7, 1999 interview report for Elaine Caufield.⁵

16 On September 26, 2007, the court issued an order for further briefing and for
17 additional documents from the state court record. The court noted that in his petition and
18 the papers filed to date, Rodriguez had contended that he received ineffective assistance
19 of counsel based on his trial counsel's failure to adequately investigate the facts of his
20 case, a claim which had been detailed in Foskett's supporting letters. However, in his
21 supplemental traverse, the court noted that Rodriguez argued as well that trial counsel's
22 failure to present evidence at trial (including witnesses who had been interviewed)
23 constituted ineffective assistance of counsel. In an effort to determine whether the issue,
24 as framed by Rodriguez in his supplemental traverse, was exhausted before the state
25 courts, the court ordered the state to submit the actual order from the California Court of
26 Appeal and a copy of Rodriguez's February 7, 2003 state habeas petition. The court
27

28⁵ Caufield has since passed away.

1 further afforded the state the opportunity to respond to Rodriguez's supplemental
2 traverse and request for an evidentiary hearing.

3 On November 11, 2007, the state filed another motion to dismiss Rodriguez's
4 habeas petition as untimely and unexhausted. It argued that as framed by Rodriguez's
5 supplemental traverse, his ineffective assistance of counsel claim was unexhausted, and
6 that to the extent he sought to raise a new, unexhausted claim, it was untimely because it
7 fell outside of the Antiterrorism and Effective Death Penalty Act's ("AEDPA") statute of
8 limitations.

9 On March 4, 2008, following Rodriguez's opposition and the state's reply, the court
10 stayed the federal habeas proceedings so that Rodriguez could return to state court to
11 fully exhaust the claim. In concluding that a stay was appropriate, the court held that the
12 new evidence and arguments presented by Rodriguez in his supplemental traverse,
13 although related to his claim before the state court, placed his ineffective assistance of
14 counsel claim in a significantly stronger evidentiary posture. Specifically, the court noted
15 that only two witnesses testified at trial in support of Rodriguez's position that the victim
16 was shot in the defense of others who were being robbed by the victim and the victim's
17 friends at the time of the shooting - Rodriguez and Thurston Breshell. Four of the
18 supplemental exhibits submitted to this court - the declarations and interview memoranda
19 from Alberty, Jackson, Caufield, and Lyons - corroborated Rodriguez's and Breshell's
20 testimony and provided additional details regarding the scene of the crime, including the
21 alleged robberies, Rodriguez's conduct, and the conduct of the numerous other
22 witnesses present that day. The court noted that those exhibits also corroborated the
23 preliminary hearing testimony of Roy Ramsey, whose failure to testify at trial provided the
24 underlying factual basis for Rodriguez's state court ineffective assistance of counsel
25 claim.

26 Additionally, in granting the stay, the court noted that following exhaustion,
27 Rodriguez would be permitted to amend his federal habeas petition to include the newly
28 exhausted claim. In support, it concluded that because the claim contained in his pro se

1 amended federal petition and the claim detailed in his supplemental traverse were tied to
2 a common core of operative facts, the exhausted claim would relate back to the timely-
3 filed claim stated in Rodriguez's November 24, 2004 amended habeas petition.

4 Rodriguez subsequently presented the claim to the California Supreme Court,
5 along with all of the additional exhibits that he filed with his supplemental traverse before
6 this court. On July 15, 2009, the California Supreme Court summarily denied his habeas
7 petition.

8 On July 24, 2009, this court reopened the case, and noted that the state had not
9 previously had an opportunity to address Rodriguez's supplemental traverse on the
10 merits. The court thus afforded the state an opportunity to file a supplemental opposition
11 brief, and for Rodriguez to file a supplemental reply, which both parties did.

12 On June 1, 2011, the court granted Rodriguez's federal habeas petition as to
13 claims pertaining to Jackson, Alberty, and Ramsey. First, regarding Jackson and Alberty,
14 the court found that trial counsel's failure to contact and interview them prior to trial and to
15 present their testimony constituted deficient performance, and was prejudicial pursuant to
16 *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

17 Second, regarding Ramsey, the court concluded that trial counsel did not render
18 deficient performance, nor could Rodriguez demonstrate prejudice, based on counsel's
19 failure to timely locate and subpoena Ramsey and secure his trial testimony. However,
20 the court held that counsel's failure to introduce Ramsey's preliminary hearing testimony
21 constituted deficient performance, and that it was prejudicial because there was a
22 reasonable probability that the introduction of Ramsey's preliminary hearing testimony
23 would have impacted the jury's verdict.

24 On June 10, 2011, respondent filed a motion to alter judgment and a request for
25 an evidentiary hearing. After briefing on the motion was complete, the court granted in
26 part respondent's motion to alter judgment, vacated the judgment in favor of petitioner,
27 and set an evidentiary hearing for the sole purpose of ascertaining Rodriguez's trial
28 counsel's reasons for not seeking to introduce Ramsey's preliminary hearing testimony.

1 Doc. no. 76. In the order granting in part the motion to alter judgment, the court held that
2 Rodriguez's claim of ineffective assistance of counsel with respect to Jackson and
3 Albery was procedurally barred, and that Rodriguez did not demonstrate cause for the
4 procedural default.

5 Following an evidentiary hearing on February 17, 2012, the court entered an order
6 denying Rodriguez's petition for writ of habeas corpus on the remaining claim of
7 ineffective assistance of counsel based on trial counsel's failure to introduce witness Roy
8 Ramsey's preliminary hearing testimony at trial. The trial attorney, Ms. Weaver, testified
9 at the evidentiary hearing that she made a strategic decision not to introduce Ramsey's
10 preliminary hearing testimony for several reasons:

11 Most significantly, she testified that her decision was based on
12 the likelihood that the prosecution would undoubtedly have
13 highlighted how Ramsey's preliminary hearing testimony was
14 both internally inconsistent with two other statements Ramsey
15 provided to authorities, and also that collectively, portions of
16 Ramsey's statements and prior testimony conflicted in several
17 important respects with Rodriguez's own testimony.
18 Additionally, Ms. Weaver noted that Ramsey was a close
19 friend of Rodriguez's, and that she believed the jury was likely
20 to question his credibility for that reason. Ms. Weaver also
relied on the fact that other witnesses, including Thurston
Breshell, whom Rodriguez was "protecting" at the time of the
shooting, testified that the victim's group of friends was
robbing Rodriguez's friends. Ms. Weaver further noted that
she was also successful in introducing Ramsey's statement to
Rodriguez that he had just been robbed as nonhearsay
evidence to demonstrate the impact that the statement had on
Rodriguez.

21 Regarding the potentially damaging external
22 inconsistencies, Ms. Weaver specifically noted that Ramsey's
23 statements contradicted Rodriguez's testimony regarding how
24 Rodriguez obtained the gun from Ramsey, and the direction in
which Rodriguez aimed the gun, both of which were important
factors with respect to Rodriguez's defense. In one of his
statements, Ramsey asserted that Rodriguez "snatched" the
gun from him, which flatly contradicted Rodriguez's testimony
that Ramsey pushed the gun into Rodriguez's hands.
Ramsey's Police Interview, Respondent's Evidentiary Hrg.
Exh. A-2 at 2. In another statement, Ramsey stated that
Rodriguez "starting shooting towards the cats that were out
there after us," suggesting that Rodriguez shot in the direction
of the victim's group. Ramsey's Police Interview,
Respondent's Evidentiary Hrg. Exh. A-2 at 6. In contrast,
Rodriguez testified that he twice fired the gun into the air, after

which two teenagers retreated, but two continued to hassle Rodriguez's friend, Breshell. Rodriguez told the remaining two to "get off" Breshell, and when they did not, Rodriguez testified that he fired the gun three more times at approximately a twenty-degree angle.

Ms. Weaver further testified that she discussed her decision not to introduce Ramsey's preliminary hearing testimony with a colleague of hers at the Alameda County Public Defender's office, and that her colleague agreed with her decision.

Doc. no. 84 at 4-5. The court found trial counsel's testimony regarding her strategic decision not to offer Ramsey's preliminary hearing testimony to be persuasive and credible. Accordingly, the court denied habeas relief on the remaining ineffective assistance of counsel claim.

Rodriguez appealed from the habeas denial. The court of appeals affirmed the judgment in part on the denial of the claim of ineffective assistance of trial counsel for failure to introduce Ramsey's preliminary hearing testimony, but reversed the judgment with respect to procedural default of the claim of ineffective assistance of trial counsel for failure to investigate and present testimony of Alberty and Jackson. Citing *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which the Supreme Court decided about one month after the court denied habeas relief, the Ninth Circuit held that "*Martinez* appears to offer Rodriguez a clear path for relief" from procedural default of the ineffective assistance of counsel claim alleging failure to investigate and present the testimony of Jackson and Alberty. *Rodriguez v. Adams*, No. 12-15485 (9th Cir. Nov. 18, 2013) ("slip op."). The claim of ineffective assistance of trial counsel with respect to Jackson and Alberty was remanded to consider whether Rodriguez can demonstrate cause under *Martinez*, in light of *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), and whether Rodriguez can demonstrate prejudice under *Coleman v. Thompson*, 501 U.S. 722 (1991). Slip op. at 5.

DISCUSSION

I. Legal Standard

A state prisoner may obtain federal review of a procedurally defaulted claim by showing cause for the default and prejudice from a violation of federal law. *Martinez v.*

1 Ryan, 132 S. Ct. 1309, 1316 (2012). In *Martinez v. Ryan*, the Supreme Court announced
2 an equitable rule by which cause may be found for excusing a procedurally defaulted
3 claim of ineffective assistance of trial counsel where a petitioner could not have raised
4 the claim on direct review and was afforded no counsel or only ineffective counsel on
5 state collateral review.

6 [A] federal habeas court [may] find “cause,” thereby excusing
7 a defendant’s procedural default, where (1) the claim of
8 “ineffective assistance of trial counsel” was a “substantial”
9 claim; (2) the “cause” consisted of there being “no counsel” or
10 only “ineffective” counsel during the state collateral review
11 proceeding; (3) the state collateral proceeding was the “initial”
12 review proceeding in respect to the “ineffective-assistance-of-
13 trial-counsel claim”; and (4) state law requires that an
14 “ineffective assistance of trial counsel [claim] . . . be raised in
15 an initial-review collateral proceeding.”

16 *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Martinez*, 132 S. Ct. at 1318-19,
17 1320-21).

18 **II. Cause and Prejudice to Excuse Procedural Default Under *Martinez***

19 **A. Whether Underlying IAC of Trial Counsel Claim is Substantial**

20 In the order of remand, the Ninth Circuit determined that three of the four *Martinez*
21 factors for establishing cause were satisfied: Rodriguez lacked counsel during his state
22 collateral proceeding; that proceeding likely constituted an “initial-review proceeding;” and
23 California’s “state procedural framework, by reason of its design and operation, makes it
24 highly unlikely in a typical case that a defendant will have a meaningful opportunity to
25 raise a claim of ineffective assistance of trial counsel on direct appeal.” Slip op. at 4-5
26 (citing *Trevino*, 133 S. Ct. at 1921). The issue thus squarely in dispute is whether the
27 underlying ineffective assistance of trial counsel claim was “substantial.”

28 Respondent contends that “lack of counsel” should not automatically satisfy the
29 requirements for cause under *Martinez*, in the absence of controlling authority finding that
30 lack of counsel in the state habeas proceeding satisfies the second *Martinez* requirement
31 that cause consist of there being “no counsel” or “ineffective counsel” during the state
32 collateral review proceeding. Opp. at 4. Respondent cites no authority for the

1 proposition that just as a represented defendant must show ineffective assistance of state
2 habeas counsel to establish cause, “an unrepresented defendant likewise should be
3 required to meet *some standard*” for reasonableness. Opp. at 6. In the order remanding
4 the claim, the Ninth Circuit found that Rodriguez lacked counsel during his state collateral
5 proceeding and found “this factor satisfied” under *Martinez*. Slip op. at 4 and n.1. Under
6 the law of the case, the court does not further consider whether Rodriguez must satisfy a
7 reasonableness standard as a pro se habeas petitioner to establish cause under
8 *Martinez*.

9 **1. Whether Underlying IAC Claim Has Some Merit**

10 Rodriguez argues that the standard for an IAC claim to be “substantial” to satisfy
11 the *Martinez* test for cause is equated with the standard for issuance of a certificate of
12 appealability where a petitioner has made a “substantial showing of the denial of a
13 constitutional right,” that is, “that reasonable jurists could debate whether (or, for that
14 matter, agree that) the petition should have been resolved in a different manner or that
15 the issues presented were adequate to deserve encouragement to proceed further.”
16 Doc. no. 101 at 2 (citing *Detrich*, 740 F.3d at 1245 (quoting *Miller-El v. Cockrell*, 537 U.S.
17 322, 336 (2003))). Respondent points out that the plurality view in *Detrich* that the
18 “substantial” requirement for cause under *Martinez* requires only a showing whether
19 “reasonable jurists” could debate the merits was not adopted by a majority of the en banc
20 panel in *Detrich*, but respondent agrees that *Martinez* requires, at a minimum, that the
21 underlying IAC claim have “some merit” and is “potentially legitimate.” Opp. at 6-7 (citing
22 *Martinez*, 132 S. Ct. at 1315, 1318). The parties agree that the Court in *Martinez* defined
23 an “insubstantial” claim as one that “does not have any merit or [] is wholly without
24 factual support.” 132 S. Ct. at 1319.

25 “[A] district court may take evidence to the extent necessary to determine whether
26 the petitioner’s claim of ineffective assistance of trial counsel is substantial under
27 *MartinezDickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc). “To
28 demonstrate that there was a reasonable probability that, absent the deficient

1 performance, the result of the post-conviction proceedings would have been different, it
2 will generally be necessary to look through to what happened at the trial stage.”
3 *Clabourne v. Ryan*, 745 F.3d 362, 377-78 (9th Cir. 2014). The plurality opinion in *Detrich*
4 noted that *Martinez* recognized that “determining whether there has been ineffective
5 assistance of counsel often requires factual development in a collateral proceeding.”
6 *Detrich*, 740 F.3d at 1246.

7 **2. Evidentiary Support for Underlying Ineffective Assistance of
8 Trial Counsel Claim**

9 Rodriguez contends that there is “no evidence in the record that trial counsel even
10 considered interviewing Jackson and Alberty.” Doc. no. 101 at 3. The record does,
11 however, have the benefit of trial counsel’s testimony regarding her trial strategy with
12 respect to her decision not to introduce Ramsey’s preliminary hearing statement. Trial
13 counsel’s strategic decisions were articulated at the evidentiary hearing that the court
14 held after issuing its initial ruling granting habeas relief, which was vacated and
15 superseded by the subsequent rulings on procedural default and denial of habeas relief.

16 In support of his *Martinez* motion, Rodriguez refers to the supplemental
17 declarations by Jackson and Alberty that he submitted to the California Supreme Court
18 with his 2008 state habeas petition.⁶ Doc. no. 101 at 3. These declarations were the
19 only evidence proffered in support of this IAC claim in the habeas petition, and Rodriguez
20 proffers no additional evidence or supporting declarations now. Respondent does not
21 challenge the admissibility of Alberty and Jackson’s declarations for consideration on the
22 present *Martinez* motion. Rodriguez contends that these declarations strongly support
23 his defense-of-others trial defense and are “mostly consistent” with other evidence
24 introduced at trial. *Id.* The court reviewed and summarized these declarations in the
25 initial ruling granting the federal habeas petition. Although the court declined to consider
26 these declarations upon determining that the ineffective assistance of trial counsel claim

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⁶ With respect to the instant *Martinez* motion, Rodriguez did not submit additional
evidence, did not request an evidentiary hearing, and did not file a reply brief.

1 was procedurally defaulted, the court now weighs this evidence to determine whether that
2 claim was "substantial" to support cause to excuse the procedural default. See *Detrich*,
3 740 F.3d at 1246. For purposes of determining cause, the court considers the proffered
4 statements of Jackson and Alberty, as well as the testimony of trial counsel as to her trial
5 tactics and strategic decisions with respect to witness testimony.

6 **a. Declaration of Vonree Alberty**

7 Alberty was present at the scene of the shooting. Scott Whitney, the investigator
8 hired by Rodriguez's habeas counsel, obtained a statement from Alberty on September
9 10, 2007. Doc. no. 44-4, Ex. B (cited in June 1, 2011 Order as Exhibit BB).

10 Alberty did not testify at trial and was not interviewed
11 prior to trial.

12 In his declaration, Alberty stated that he was hanging
13 out on Melrose Avenue with Jackson and Breshell on the day
14 of the shooting. Jackson and Alberty were in the car while
Breshell stood next to the car on the sidewalk. Ramsey was
on Melrose Avenue, but was not necessarily in or next to the
car at the time.

15 Alberty observed the Walker car drive by with
16 approximately ten people in it. He lost sight of the car when it
17 turned onto 48th Avenue. A little later, Alberty saw the same
group of people walking down the sidewalk towards Jackson's
18 car. Alberty thought that something was suspicious so he got
out of the car. The two groups exchanged small talk, but the
Walker group seemed to be acting suspiciously to Alberty.

19 Alberty stated that Ramsey seemed to be avoiding the
20 Walker group. After talking with Alberty for a bit, the Walker
21 group then started to walk away. Alberty got back in the car
with Jackson. However, the Walker group did not leave, but
22 instead formed a huddle and began whispering to each other.
The Walker group then split into several groups: two went to
23 Jackson's side of the car, two went to Breshell, two were on
the sidewalk behind Alberty's car door, and three or four more
24 were somewhere behind the car. Hawkins, a member of the
Melrose group, was also present at this point.

25 The Walker group then aggressively questioned
26 Jackson and Alberty about whether they had any drugs.
Alberty stated that the Walker group was attempting to rob
27 them. Alberty did not see any weapons, though. Alberty then
saw Breshell start pushing and slapping the two guys
surrounding him. Alberty was not sure whether they were
fighting or whether the Walker group was trying to rob
28 Breshell. Alberty, who had since gotten back into the car,

1 then jumped out of the car again to help Breshell. He started
2 fighting with the Walker group.

3 Alberty heard four shots come from behind him. He
4 believed these shots came from the Walker group. Alberty
5 then heard another four shots come from a different direction,
6 shot from a seemingly different caliber gun. Everyone
7 dropped to the ground at the sound of the gunshots. When
8 the shots stopped, Alberty stood up and noticed someone on
9 the ground. He was laying in the area where Alberty believed
10 the shots originated.

11 The Walker car then pulled up, members of the Walker
12 group got into the car, and the car left the scene. Similarly,
13 Jackson and Alberty drove away from the scene.

14 Alberty also recounted a threatening experience he had
15 with the Walker group a few months after the shooting.
16 Alberty was identified by members of the Walker group while
17 he was at a store. The members of the Walker group then
18 followed Alberty to his neighborhood. While Alberty hid in his
19 sister's house, he saw the members of the Walker group
20 searching the neighborhood for him. Alberty stated that he
21 observed all of the members of the search group with guns.

22 June 1, 2011 Order at 21-22.

23 **b. Declaration of Kenneth Jackson**

24 Jackson was also present at the scene of the shooting. Whitney, the investigator
25 hired by Rodriguez's habeas counsel, obtained a statement from Jackson on September
26 16, 2007. Doc. no. 44-6, Ex. C (cited in June 1, 2011 Order as Exhibit CC).

27 Jackson did not testify at trial and like Alberty, he also
28 was not interviewed by the defense prior to trial.

29 In his declaration, Jackson stated that prior to the
30 shooting, he was hanging out, sitting in his parked car on
31 Melrose Avenue. Ramsey, Alberty, and Breshell were
32 hanging out with him in and around the car. At some point,
33 Ramsey moved down the street, Alberty got in the passenger
34 side of Jackson's car, and Breshell remained next to the car.

35 Jackson then saw a station wagon occupied by nine
36 people, the Walker car, drive by. As they drove by, Jackson
37 noticed that they looked at the Melrose group aggressively.
38 The Walker car made a u-turn on 48th Avenue and parked
39 near the corner. Hawkins, another member of the Melrose
40 group, was close to the Walker group as they got out of their
41 car at the corner.

42 The Walker group started to approach the Melrose
43 group. Five members of the Walker group surrounded
44 Ramsey, two remained close to where they had parked their

1 car, and two more approached Jackson's car. At this point,
2 Jackson noticed that the members of the Walker group were
3 carrying open bottles of alcohol, and that the two who were
4 approaching Jackson's car briefly stopped to urinate on a
lawn. The members of the Walker group who were not
surrounding Ramsey appeared to Jackson to be acting as
lookouts.

5 In his car's rearview mirror, Jackson saw Ramsey
6 giving the contents of his pockets to a member of the Walker
7 group. Then, a member of the Walker group pulled the station
wagon into the middle of the street and parked it behind
Jackson's car. The driver got out of the station wagon and
aggressively approached Jackson. Jackson stated that he
understood this person's actions as an attempt to rob him.

8 Jackson then heard Ramsey yell to the driver that
9 Jackson didn't have any drugs and that the Walker group
10 should leave Jackson alone. Apparently in response, the
11 driver then approached Breshell instead. Other members of
the Walker group who had previously been acting as lookouts
also approached Breshell at this point. Breshell then punched
the driver of the Walker group in the face.

12 Jackson and Alberty began to exit the car to help
13 Breshell. However, as soon as they got out of the car,
14 Jackson heard a gunshot. Jackson ducked, got back in his
15 car, and started the engine. Jackson then heard two more
shots. Alberty got back in the car, and Jackson and Alberty
drove away.

16 Jackson stated that he did not see any guns on the
17 Walker group.

18 June 1, 2011 Order at 22-23.

19 As respondent points out, neither Jackson nor Alberty stated that they were willing
20 to testify at Rodriguez's trial in 1999. On the contrary, their declarations indicate that they
21 were scared about being identified by the people involved in the shooting. Jackson
22 described the incident as "the scariest day of my life." Doc. no. 44-6. Alberty stated that
23 he never went back to his friend Roberto's house, where the shooting occurred, after the
24 incident. Doc. no. 44-4. Alberty also stated that a few months after the shooting, he saw
25 two guys from the shooting incident who seemed to recognize him at a store and then
26 followed him to his sister's house, appearing to have guns and looking for Alberty, which
27 made him nervous for months and years to come. Doc. no. 44-4. Alberty stated that no
28 one from the legal system talked to him about the shooting, and that he was less

1 concerned now about being recognized because he and the other guys involved in the
2 incident were grown and all look different. Doc. no. 44-4 ¶¶ 11-13. Unlike witness
3 Ramsey who testified at the preliminary hearing, neither Jackson nor Alberty spoke to
4 police or the defense investigator, or testified at the preliminary hearing. There is no
5 evidence in the record to suggest that these witnesses would have come forward and/or
6 cooperated with the defense at the time of trial. Even when considering the declarations
7 provided by Jackson and Alberty nine years after the incident, it is purely speculative
8 whether they would have testified on Rodriguez's behalf at trial or helped the defense.

9 **3. No Substantial Claim of Ineffective Assistance of Trial Counsel**

10 In order to show that his ineffective assistance of trial counsel claim was
11 "substantial" under *Martinez*, Rodriguez must demonstrate that there is "some merit" to
12 his claim that trial counsel's performance was deficient and that this deficient
13 performance prejudiced the defense. To establish prejudice under *Strickland*, the
14 petitioner must show a reasonable probability that but for counsel's failure to track down
15 the witness, the result of the guilt phase would have been different. *Hurles v. Ryan*, 752
16 F.3d 768, 782 (9th Cir.) (citing *Strickland*, 466 U.S. at 694), cert. denied, 135 S. Ct. 710
17 (2014). "A reasonable probability is a probability sufficient to undermine confidence in
18 the outcome." *Id.*

19 In *Hurles*, the Ninth Circuit held that the petitioner failed to establish cause to
20 excuse the procedural default of his ineffective assistance of trial counsel claim based on
21 failure to investigate a witness who had intimate contact with the petitioner just hours
22 before he committed murder. The court determined that the witness was not located by
23 the habeas investigator and that the court could only speculate as to whether her
24 testimony about the petitioner's behavior and mental state before the crime would have
25 helped or undermined the petitioner's insanity defense. The court in *Hurles* held that the
26 petitioner failed to establish the prejudice prong of his claim of ineffective assistance of
27 trial counsel under *Strickland*, finding that the "claim of prejudice amounts to mere
28 speculation," and therefore failed to establish cause to excuse procedural default of that

1 claim. 752 F.3d at 782 (citing *Cooks v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1981)).
2 With respect to the claim of ineffective assistance of appellate counsel, however, the
3 *Hurles* court determined that the petitioner sufficiently demonstrated deficient
4 performance and prejudice to establish cause to excuse the procedural default of that
5 IAC claim. 752 F.3d at 783-84.

6 **a. Strickland Deficient Performance Prong**

7 Rodriguez relies on the court's earlier finding that, in the absence of any
8 declaration from trial counsel regarding her failure to investigate or introduce Jackson or
9 Alberty's testimony at trial, "there is very little, if anything, in the record regarding her
10 reasons and/or trial strategy" and that "it appears that counsel's failure to present their
11 testimony resulted not from a strategic decision but from inattention." June 1, 2011 Order
12 at 34, 35. The court, however, subsequently vacated the holding that Rodriguez was
13 entitled to habeas relief on his claim of ineffective assistance of trial counsel based on
14 failure to investigate and introduce testimony from Alberty and Jackson, upon
15 determining that the claim was procedurally barred. Aug. 23, 2011 Order at 6-7. The
16 court now determines, based on the record as supplemented by trial counsel's testimony,
17 that Rodriguez has not shown either deficient performance or a reasonable probability
18 that, but for trial counsel's failure to interview, investigate or introduce testimony by
19 Alberty or Jackson, the result of the proceeding would have been different.

20 In determining whether there is cause to excuse the procedural default, the court
21 may rely on the record as supplemented by trial counsel's testimony at an evidentiary
22 hearing held by the court on February 17, 2012. See *Dickens*, 740 F.3d at 1321. Trial
23 counsel articulated her strategic reasons with regard to her decision not to introduce
24 Ramsey's preliminary hearing testimony, including concerns whether the witness's
25 statements would have corroborated, or conflicted with, Rodriguez's testimony, and trial
26 counsel's determination that Breshell was a credible witness who testified that young
27 men from the victim's group were trying to rob him and that one of them had a gun; that
28 the testimony about the attempted robberies of both Ramsey and Breshell came in

1 through several witnesses to show their effect on Rodriguez and his state of mind; and
2 that this evidence supported the defense of others theory at trial. Doc. no. 91 (Feb. 17,
3 2012 Transcript) ("Tr.") at 14, 19, 22-24, 26, 29.

4 Those strategic considerations establish that it was within the bounds of
5 reasonable attorney performance not to call additional witnesses, such as Albery and
6 Jackson, to testify about the encounter leading up to the shooting. In particular, trial
7 counsel explained why she thought that Thurston Breshell was a critical witness to
8 establish that Breshell was being robbed and that Rodriguez was acting in defense of
9 others:

10 Mr. Breshell had no record at all, so he could take the stand
11 without being impeached. The testimony about the robbery
12 came in through several of the witnesses and through my
client's statement, both on the stand and through Sergeant
Holoman to whom he gave the statement.
13 Tr. at 19. Trial counsel recounted that Breshell testified that the young men involved in
14 the incident were going through his pockets and attempting to rob him, which supported
15 the theory of defense of others or "misguided" defense of others. Tr. at 26, 28. Breshell
16 also testified that he saw a gun in the possession of one of the people coming towards
17 him. Tr. at 41; Answer, Ex. 2 ("Trial Tr.") at 267. Trial counsel stated that Breshell's
18 testimony corroborated Rodriguez's testimony that he believed he was protecting
19 Breshell. Tr. at 14. With this evidence presented at trial, it was within the "wide range of
20 reasonable professional assistance" for trial counsel not to interview or call additional
21 witnesses to testify about the shooting incident and widen the possibility for
22 inconsistencies or impeachment. See *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

23 In light of the current record, the court's earlier finding, that "it appears that
24 counsel's failure to present [Albery and Jackson's] testimony resulted not from a
25 strategic decision but from inattention," was erroneous in failing to attribute the
26 presumption of adequate performance to which trial counsel was entitled under
27 *Richter*, 562 U.S. at 109 (recognizing the "strong presumption" that counsel's attention to
28 certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect')).

1 See June 1, 2011 Order at 35. Trial counsel testified that she knew there were other
2 percipient witnesses, based on Ramsey's preliminary hearing testimony. Tr. at 37.
3 Although the court limited the scope of the evidentiary hearing to trial counsel's decision
4 not to introduce Ramsey's testimony, it can be inferred from the record, including
5 Breshell's trial testimony stating that he was with Jackson and Alberty, that trial counsel
6 was aware that Jackson and Alberty were present at the time of the shooting. Trial
7 counsel is entitled to a presumption of adequate performance, and the decision not to
8 investigate or interview Jackson and Alberty fell within the wide range of reasonable
9 assistance under the circumstances, given that the identity of the shooter was not at
10 issue and that trial counsel planned to elicit testimony from other witnesses at trial to
11 present evidence of Rodriguez's state of mind in support of the defense-of-others theory.
12 See *Gentry v. Sinclair*, 705 F.3d 884, 900 (9th Cir. 2013) (because "counsel is strongly
13 presumed to have rendered adequate assistance," even where trial counsel's affidavits
14 did not address the specific IAC claim, it was not unreasonable for the state court to
15 conclude that trial counsel's performance was not deficient when the petitioner had no
16 evidence to indicate why the failure to present evidence of psychological condition was
17 unreasonable under the circumstances) (citing *Strickland*, 466 U.S. at 690). Cf. *Avila v.*
18 *Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (finding deficient performance where
19 defendant denied that he was the shooter and defense counsel failed to investigate or
20 introduce witnesses who told counsel that they saw the shooter); *Sanders v. Ratelle*, 21
21 F.3d 1446, 1457 (9th Cir. 1994) (petitioner was denied effective assistance of counsel
22 where defense counsel failed to investigate evidence of the "most important defense: that
23 [the defendant's brother who was at the scene] was the shooter").

24 **b. *Strickland* Prejudice Prong**

25 Even if trial counsel performed below an objective standard of reasonableness by
26 failing to contact, investigate and call Alberty and/or Jackson to testify at trial, Rodriguez
27 fails to show prejudice from any such unprofessional error to establish a "substantial" IAC
28 of trial counsel claim. See *Hurles*, 752 F.3d at 782. To the extent that the court's prior

1 rulings could be construed as a finding of a reasonable probability that, but for trial
2 counsel's failure to interview or call Albery and/or Jackson to testify, the trial outcome
3 would have been different, those findings are vacated. In light of trial counsel's testimony
4 about trial tactics and her strategic evaluations about the strength of the case, it is not
5 reasonably probable that the proffered testimony of Albery and Jackson would have
6 affected the verdict.

7 First, the proffered testimony of Albery and Jackson is cumulative of Breshell's
8 trial testimony that he was being robbed in support of Rodriguez's defense-of-others
9 theory. Tr. at 12-14, 26. Further, as trial counsel explained at the evidentiary hearing,
10 both Rodriguez and Breshell testified not only about the attempted robbery on Breshell,
11 but also that they heard Ramsey say that he was robbed, which was admitted for the
12 effect on Rodriguez's state of mind. Tr. at 14-15, 29-30, 49-50. See Trial Tr. at 270.
13 Trial counsel offered Breshell and Rodriguez's testimony, as well as the transcript of
14 Rodriguez's statement to the police, as evidence to support either a perfect defense-of-
15 others defense or an imperfect defense of others on the theory that Rodriguez shot the
16 victim "in the actual but unreasonable belief in the necessity to defend another against
17 imminent peril to life or great bodily injury." Answer, Ex. 1 (Clerk's Transcript) at 289-314
18 (jury instructions on first and second degree murder and voluntary manslaughter, and
19 defining robbery as a forcible and atrocious crime which threatens life or great bodily
20 injury). The proffered testimony of Albery and Jackson would have been merely
21 cumulative of Breshell's corroboration of Rodriguez's testimony, and does not support a
22 reasonable probability that but for counsel's unprofessional errors, the result of the
23 proceeding would have been different.

24 Second, neither Albery nor Jackson saw who fired the shots or where they came
25 from, and could not, therefore, corroborate Rodriguez's account that he fired two warning
26 shots in the air and then lowered the gun and fired additional shots at a slight angle
27 toward the ground, but not aiming toward the victim's group. Tr. at 24. As trial counsel
28 explained, despite what Rodriguez testified, there were two independent witnesses who

1 saw Rodriguez fire directly at the young men with his arm parallel to the ground, and the
2 “most damaging” evidence in the case was how the bullet traveled and the coroner’s
3 preliminary hearing testimony “that the bullet entered the victim’s ear and traveled
4 straight through the brain at neither an up or down angle.” Tr. at 11-12. At trial, the
5 coroner testified that the bullet entered the victim’s right ear, that the bullet caused
6 perforating defects to the inside of the skull and to the brain, and that a bullet fragment
7 was recovered from the left side of the victim’s brain, underneath the left forehead. Trial
8 Tr. at 138-39. The coroner determined from the bullet’s path that the bullet “didn’t really
9 tend relative to the body either [to] go up or down,” although there was no indication
10 whether the victim was standing or bending down at the time he was shot. *Id.* at 138,
11 145. Jackson and Alberty’s declarations do not rebut the evidence suggesting that
12 Rodriguez fired directly at the Walker group and do not corroborate Rodriguez’s account
13 about the shooting. In particular, Alberty’s statement that he thought Rodriguez (“Sal”)
14 was coming from the direction of his house to investigate after the shooting occurred
15 contradicts Rodriguez’s own admission that he fired the gun. See doc. no. 44-4 ¶ 10.
16 Alberty’s statements that he believed that someone from the victim’s party fired the first
17 round of four shots, and then he heard another set of four shots from a different caliber
18 gun coming from a different direction were also inconsistent with defense testimony that
19 Rodriguez fired two warning shots in the air before firing four additional shots angled
20 downward. See doc. no. 44-4 ¶ 7.

21 Third, Rodriguez has not shown that the witnesses would have supported his
22 defense that use of deadly force was justified, given Alberty’s statement that he didn’t see
23 the victim’s party (the Walker group) carry any weapons, and Jackson’s statement that he
24 did not know “if any of the guys who tried to rob us had guns.” Doc. no. 44-4 ¶ 6; doc.
25 no. 44-6 ¶ 14. After observing the Walker group moving in on Breshell, rather than
26 fearing use of deadly force, Jackson felt prompted to “get out and fight” before hearing a
27 gun shot and then squatting at the side of his car. Doc. no. 44-6 ¶¶ 12-13. By contrast,
28 Breshell had testified that he saw a gun in the possession of one the people in the Walker

1 group coming toward him. Trial Tr. at 267. Neither Alberty nor Jackson would have been
2 able to corroborate Breshell's testimony that at least one of the assailants was armed.
3 Even Rodriguez himself admitted that he did not see a gun on any member of the Walker
4 group. Trial Tr. at 315.

5 Finally, the declarations by Alberty and Jackson do not directly state or even
6 suggest that they would have testified on behalf of the defense at the time of the trial;
7 both witnesses indicate that they had nothing to do with the shooting and that they were
8 scared by the incident, suggesting that they would not have come forward to testify.

9 Under Supreme Court authority, counsel is entitled to a presumption of
10 effectiveness, even without direct evidence of her trial strategy with respect to the
11 witnesses who were not interviewed or called to testify. *Burt v. Titlow*, 134 S. Ct. 10, 17-
12 18 (2013) ("It should go without saying that the absence of evidence cannot overcome
13 the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable
14 professional assistance.'") (citing *Strickland*, 466 U.S. at 689). See *Gentry v. Sinclair*,
15 705 F.3d 884, 900 (9th Cir. 2013) ("counsel is strongly presumed to have rendered
16 adequate assistance") (citing *Strickland*, 466 U.S. at 690). In light of the record, including
17 the evidentiary hearing conducted by the court, the declarations of Alberty and Jackson
18 do not establish prejudice under *Strickland* to support a "substantial" claim of ineffective
19 assistance of trial counsel. *Hurles*, 752 F.3d at 782. Rodriguez fails to show that there
20 was a "substantial, not just conceivable" likelihood of a different result if the jury had
21 considered such evidence. *Clark v. Arnold*, 769 F.3d 711, 728 (9th Cir. 2014) (citing
22 *Richter*, 131 S. Ct. at 792).

23 **III. Prejudice Requirement Under *Martinez***

24 For purposes of determining on remand whether Rodriguez can demonstrate
25 cause and prejudice to excuse procedural default, the court adopted the view expressed
26 in Judge Fletcher's plurality opinion in *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en
27 banc), *cert. denied*, 134 S. Ct. 2662 (2014), that "there is no need to show 'prejudice'
28 resulting from the failure of the pro se prisoner during the state PCR proceeding to raise

1 a claim of trial-counsel IAC, over and above the need to satisfy the first *Martinez*
2 requirement that the underlying trial-court IAC claim be ‘substantial.’” *Detrich*, 740 F.3d
3 at 1245 (9th Cir. 2013). See also *Clabourne*, 745 F.3d at 377-78 (noting the overlap
4 between the requirements of cause and prejudice in that an element of prejudice must be
5 established within the cause prong: “to show ineffective assistance of post-conviction
6 relief counsel, a petitioner must establish a reasonable probability that the result of the
7 postconviction proceeding would have been different”). As the court in *Clabourne*
8 articulated, a majority of the en banc panel in *Detrich* did not adopt Judge Fletcher’s
9 plurality opinion that the prejudice prong is not required separately from showing cause
10 under *Martinez*, but the majority of judges in *Detrich* concluded that “prejudice” requires
11 only a showing that the trial-level ineffective assistance of counsel claim was
12 “substantial.” *Clabourne*, 745 F.3d at 377 (noting that the five dissenting judges in
13 *Detrich* recognized that procedural default of an IAC claim may be excused under
14 *Martinez* “if the petitioner establishes both (1) cause and (2) prejudice, by showing that
15 the underlying claim of trial counsel’s ineffectiveness is substantial, meaning that it has
16 some merit” (citing *Detrich*, 740 F.3d at 1261) (Graber, J., dissenting)) (internal citation
17 and quotation marks omitted). That is, “if the claim of ineffective assistance of trial
18 counsel is implausible, then there could not be a reasonable probability that the result of
19 post-conviction proceedings would have been different.” *Id.* See also *Hurles*, 752 F.3d
20 at 781 (to establish cause for the procedural default of an IAC claim, the petitioner must
21 show that post-conviction counsel was ineffective in not raising a particular claim under
22 both the deficient performance and prejudice prongs pursuant to *Strickland v.*
23 *Washington*, 466 U.S. 668 (1984), and that the underlying IAC claim is “substantial,”
24 meaning that it “has some merit” (citing *Martinez*, 132 S. Ct. at 1318)).

25 Under the majority view of the *Detrich* en banc panel, as recognized by the court in
26 *Clabourne*, 745 F.3d at 376-77, both the cause and prejudice prongs must be
27 demonstrated in order to excuse procedural default under *Martinez*. Because the court
28 finds that there was no “cause” for excusing the procedural default, however, it is not

1 necessary to proceed to determine whether Rodriguez has established the "prejudice"
2 requirement under *Martinez*.

3 **CONCLUSION**

4 For the reasons set forth above, the court DENIES petitioner's *Martinez* motion to
5 excuse the procedural default of the claim of ineffective assistance of trial counsel based
6 on failure to investigate and present testimony by Jackson and Alberty. The remanded
7 claim for habeas relief is therefore DISMISSED as procedurally barred, for the reasons
8 set forth in the August 23, 2011 Order. The clerk shall close the file.

9 **CERTIFICATE OF APPEALABILITY**

10 The federal rules governing habeas cases brought by state prisoners require a
11 district court that enters a final order adverse to the petitioner to grant or deny a
12 certificate of appealability in the order. See Rule 11(a), Rules Governing § 2254 Cases,
13 28 U.S.C. foll. § 2254.

14 A petitioner may not appeal a final order in a federal habeas corpus proceeding
15 without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R.
16 App. P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a
17 procedural question antecedent to the merits. See *Slack v. McDaniel*, 529 U.S. 473, 483
18 (2000).

19 "Determining whether a COA should issue where the petition was dismissed on
20 procedural grounds has two components, one directed at the underlying constitutional
21 claims and one directed at the district court's procedural holding." *Id.* at 484-85. "When
22 the district court denies a habeas petition on procedural grounds without reaching the
23 prisoner's underlying constitutional claim, a COA should issue when the prisoner shows,
24 at least, that jurists of reason would find it debatable whether the petition states a valid
25 claim of the denial of a constitutional right and that jurists of reason would find it
26 debatable whether the district court was correct in its procedural ruling." *Id.* at 484. As
27 each of these components is a "threshold inquiry," the federal court "may find that it can
28 dispose of the application in a fair and prompt manner if it proceeds first to resolve the

1 issue whose answer is more apparent from the record and arguments.” *Id.* at 485.
2 Supreme Court jurisprudence “allows and encourages” federal courts to first resolve the
3 procedural issue, as was done here. See *id.*

4 Section 2253(c)(3) requires a court granting a COA to indicate which issues satisfy
5 the COA standard. Here, the court finds that the issues whether the underlying
6 ineffective assistance of counsel claim was substantial and the procedural question
7 whether Rodriguez has established cause under *Martinez* to excuse the procedural
8 default meet the above standard and accordingly GRANTS the COA as to those issues.
9 See *Miller-El*, 537 U.S. at 338.

10 Accordingly, the clerk shall forward the file, including a copy of this order, to the
11 Court of Appeals. See Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268,
12 1270 (9th Cir. 1997).

13 **IT IS SO ORDERED.**

14 Dated: March 25, 2015



PHYLLIS J. HAMILTON
United States District Judge

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